STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 14, 2008
v	No. 283366 Macomb Circuit Court
MICHAEL PATRICK WALSH, Defendant-Appellant.	LC No. 07-002450-AR

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant was charged with possession of marijuana, MCL 333.7403(2)(d). He filed a motion to dismiss this charge, which the district court granted and the circuit court reversed. Defendant appeals by leave granted. We affirm.

While on early morning patrol, Deputies Brandon Stefanski and Venet observed Alexander Ellington's occupied 1996 Ford Contour parked on a public street. Deputy Stefanski approached the person in the driver's seat, Ellington, who reported that he and his occupants, Cory Fuller and defendant, were just "'hanging out.'" Deputy Stefanski smelled marijuana in the Contour and asked the occupants if they possessed it. Fuller, who sat in the front passenger seat, retrieved a bag of marijuana from his pocket and handed it to Deputy Stefanski. Deputy Venet removed Fuller from the Contour and arrested him for possession of marijuana. The deputies also asked Ellington to exit the Contour and he subsequently consented to be searched. Nothing was recovered from Ellington, but the deputies placed him in their patrol car.

Next, Deputy Venet spoke to defendant, who remained in the rear passenger seat. Deputy Venet asked defendant if he possessed marijuana. Defendant took a deep breath and stated, '"yes."' He also retrieved a ziplock bag of marijuana, which he had purchased for $10, from his pocket and handed it to Deputy Venet. The deputies arrested defendant.

Defendant's first claim on appeal is that an investigatory stop occurred when the deputies approached Ellington's parked vehicle. He maintains that there was no reasonable suspicion for this stop and any evidence flowing from it should have been suppressed. We disagree.

The Fourth Amendment protects citizens from unreasonable searches and seizures. *People v Bloxson*, 205 Mich App 236, 240; 517 NW2d 563 (1994). There are three categories of

encounters, between the police and citizens, associated with Fourth Amendment protections. *Id.*, p 241.

> The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe that a person has committed or is committing a crime. The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment 'seizure,' but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. The third category involves no restraint on the citizen's liberty, and is characterized by an officer seeking the citizen's voluntary cooperation through noncoercive questioning. This is not a seizure within the meaning of the Fourth Amendment. [*Id.*]

There is no evidence that the deputies had reasonable, articulable suspicion for approaching Ellington's vehicle. A vehicle parked in the dark does not, by itself, arouse such suspicion. *People v Freeman*, 413 Mich 492, 496-497; 320 NW2d 878 (1982). Nevertheless, it appears that the deputies approached Ellington's vehicle seeking voluntary cooperation through noncoercive questioning. *Bloxson, supra*, p 241. In response to Deputy Stefanski's questions, Ellington voluntarily stated his name and indicated that he, Cory Fuller and defendant were "just 'hanging out.'" Moreover, when the deputies asked if the occupants had marijuana, Fuller voluntarily revealed his ziplock bag. By consenting to the questioning, the occupants waived protections against unreasonable searches and seizures. *People v Shankle*, 227 Mich App 690, 695; 577 NW2d 471 (1998). Thus, no reasonable, articulable suspicion was required to approach and initially encounter the occupants of Ellington's parked car. *Bloxson, supra*, p 241. Therefore, we conclude that the circuit court did not err when it reversed the district court's order dismissing defendant's charge.

Defendant maintains that the deputies' questioning rose to the level of an investigatory stop because it was potentially incriminating. Intimidating circumstances may transform noncoercive questioning into an investigatory stop. See *Shankle, supra*, p 697. This Court found intimidating circumstances existed in *Bloxson, supra*, pp 244-245, where the officer repeated potentially incriminating questions after the defendant repeatedly refused to cooperate. There is no evidence that defendant made similar refusals or experienced repeated questioning here. Therefore, the potentially incriminating nature of the deputies' questions, alone, did not require reasonable suspicion.

Defendant's second claim on appeal is that Deputy Venet should have provided defendant with *Miranda* warnings before asking whether he possessed marijuana. Neither the district court nor the circuit court ruled on defendant's argument. Therefore, this issue is not properly preserved on appeal and need not be considered absent manifest injustice. *People v Metamora Water Service, Inc*, 276 Mich App 376, 383; 741 NW2d 61 (2007). Because this issue still pends before the trial court, no miscarriage of justice will result from our failure to address this issue.

Affirmed.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello